Supreme Court, U.S.
FILED
OCT 6 1999
OFFICE OF THE CLERK

No. 99-370

In The
Supreme Court of the United States

JOHNNIE LEE EVANS
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JULIE A. BAUER
BRUCE R. BRAUN*
CORNELIUS M. MURPHY
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel for Petitioner
**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE STATE IMPROPERLY RELIES ON ILLINOIS AUTHORITY 1

II. MR. EVANS WAS DENIED EFFECTIVE ASSISTANCE BY DEFENSE COUNSELS' FAILURE TO INVESTIGATE AND INTRODUCE AVAILABLE EVIDENCE THAT HE WAS ACTING UNDER AN EXTREME EMOTIONAL OR MENTAL DISTURBANCE AT THE TIME OF THE OFFENSE 1

A. Defense Counsels' Failure to Present a Mitigation Defense Based on Available Evidence that Mr. Evans Was Acting under an Extreme Emotional or Mental Disturbance at the Time of the Offense Cannot Be Attributed to Trial Strategy 2

B. Mr. Evans Was Prejudiced by Defense Counsels' Failure to Present a Mitigation Defense Based on Available Evidence that Mr. Evans Was Acting under an Extreme Emotional or Mental Disturbance at the Time of the Offense 4

III. MR. EVANS WAS DENIED EFFECTIVE ASSISTANCE BY DEFENSE COUNSELS' FAILURE TO INVESTIGATE AND INTRODUCE OTHER AVAILABLE MITIGATING EVIDENCE 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) 8

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) cert. denied, 519 U.S. 1067 (1996) 8

Hall v. Washington, 106 F.3d 742 (7th Cir. 1997) 7

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

People v. Caballero, 126 Ill. 2d 248, 533 N.E.2d 1089 (1989) 1

People v. Coleman, 168 Ill. 2d 509, 660 N.E.2d 919 (1995) 9

People v. Evans, 125 Ill. 2d 50, 530 N.E.2d 1360 (1988) 4

People v. Holman, 164 Ill. 2d 356, 647 N.E.2d 960 (1995) 1

People v. Perez, 148 Ill. 2d 168, 592 N.E.2d 984 (1989) 9

People v. Ruiz, 177 Ill. 2d 368, 686 N.E.2d 574 (1997) 9

People v. Sanchez, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996) 1

ARGUMENT

I. THE STATE IMPROPERLY RELIES ON ILLINOIS AUTHORITY

In its Response, the State relies heavily on ineffective assistance cases decided by the Supreme Court of Illinois. *See, e.g.*, State Brief at 15 (relying on *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996); State Brief at 20 (relying on *People v. Caballero*, 126 Ill. 2d 248, 533 N.E.2d 1089 (1989); State Brief at 21 (relying on *People v. Holman*, 164 Ill. 2d 356, 647 N.E.2d 960 (1995). Indeed, the State boldly asserts that "[t]he federal cases cited in support of petitioner's argument are inapplicable here[.]" (State Brief at 27)

The State's reliance on Illinois authority ignores the fact that the very basis of Mr. Evans' petition to this Court is the errors committed by the Supreme Court of Illinois in rejecting his claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. For this reason, the State's arguments based on Illinois authority must be rejected by this Court.

II. MR. EVANS WAS DENIED EFFECTIVE ASSISTANCE BY DEFENSE COUNSELS' FAILURE TO INVESTIGATE AND INTRODUCE AVAILABLE EVIDENCE THAT HE WAS ACTING UNDER AN EXTREME EMOTIONAL OR MENTAL DISTURBANCE AT THE TIME OF THE OFFENSE

The State's arguments in response to Mr. Evans' claim that he was denied effective assistance of counsel based on defense counsels' failure to investigate and introduce evidence that he was acting under an extreme emotional or mental disturbance are specious. Defense counsel did not investigate and weigh the merits of presenting evi-

dence of extreme emotional or mental disturbance, determine that the evidence was either unavailable, flawed or potentially damaging, and then strategically elect not to present the evidence in mitigation. Rather, the record makes clear that counsel decided to advance such a theory, but then failed to introduce evidence supporting it. Nor was defense counsel precluded from going forward with a theory of extreme emotional or mental disturbance because of Mr. Evans' denial of guilt, as the State claims. It was defense counsels' lack of diligence, rather than any drawback or strategy, which prevented them from introducing evidence of extreme emotional or mental disturbance. Further, the record in this case indicates that Mr. Evans was prejudiced by this error. Thus, the Supreme Court of Illinois erred in its application of *Strickland* to Mr. Evans' claim, and this Court should grant a writ of certiorari to rectify this error.

A. Defense Counsels' Failure to Present a Mitigation Defense Based on Available Evidence that Mr. Evans Was Acting under an Extreme Emotional or Mental Disturbance at the Time of the Offense Cannot Be Attributed to Trial Strategy

The original trial record clearly establishes defense counsels' tactical decision to rely on the statutory mitigating factor of extreme mental or emotional disturbance at the time of the offense. Immediately after Mr. Evans was found guilty, defense counsel asked for a continuance so that Mr. Evans could be examined by Dr. Rosenwald, whom they "expect[ed]. . . to testify in the mitigation phase." (TR at 2464) The next day, they followed up with a written motion for a continuance so that Mr. Evans could be examined by psychological and possibly psychiatric personnel. (TCR at 3352, TR at 2470-2473) In response to a

question from the court, defense counsel indicated that the purpose of the examination was "mitigation. I believe one of the factors in mitigation that extreme mental, emotional distress." (TR at 2471) Finally, in closing argument, counsel argued that the "basic reason" why Mr. Evans should not receive the death sentence was because he was acting under an extreme emotional or mental disturbance at the time of the offense. (TR 3074)

In addition, the State's conjecture that defense counsel was precluded from presenting a theory of extreme emotional or mental disturbance theory because of Mr. Evans' denial of guilt is belied by the record. During trial counsel's direct examination of Mr. Evans, she made no attempt whatsoever to elicit testimony that would support a theory of innocence or alibi. Nor did trial counsel call any other witnesses that would support such a theory. The very fact that trial counsel retained Dr. Rosenwald manifests their decision to present a theory other than innocence. If trial counsel had determined to present a defense of innocence or alibi, Dr. Rosenwald's testimony would have been wholly irrelevant to and inconsistent with that defense. Again, trial counsel's closing argument -- after Mr. Evans had testified and denied guilt -- nowhere attempts to establish an innocence or alibi defense; rather, counsel argued that the "basic reason" why Mr. Evans should not receive the death sentence was because he was acting under an extreme emotional or mental disturbance at the time of the offense. (TR 3074) These facts make clear that, contrary to the State's contention, trial counsel did not elect to present a defense of innocence or alibi. Rather, defense counsel intended to present a theory of extreme emotional or mental disturbance, but failed to investigate and introduce the evidence to support that theory.

B. Mr. Evans Was Prejudiced by Defense Counsels' Failure to Present a Mitigation Defense Based on Available Evidence that Mr. Evans Was Acting under an Extreme Emotional or Mental Disturbance at the Time of the Offense

The State's argument that Mr. Evans was not prejudiced by defense counsels' failure to investigate and introduce evidence of extreme emotional or mental disturbance is contradicted by the record.

First, the trial court's comments in imposing the death penalty demonstrate the prejudice Mr. Evans suffered due to his counsel's deficiencies. In its analysis of mitigation, the trial court specifically found that Mr. Evans was not acting under the influence of extreme mental or emotional disturbance at the time of the offense. (TR at 3101-3102) Unaware of the evidence supporting this mitigating factor, the trial court found that there were no mitigating circumstances sufficient to preclude the imposition of the death penalty. *Id.* The trial court then sentenced Mr. Evans to death. (TR at 3102, 3408)

Further, in affirming Mr. Evans' conviction and sentence on direct appeal, the Supreme Court of Illinois highlighted the fact that "nowhere in his testimony does Dr. Rosenwald specifically state that defendant operated under extreme mental or emotional disturbance at the time he committed the offense." *People v. Evans*, 125 Ill. 2d 50, 89, 530 N.E.2d 1360, 1376 (1988). The Supreme Court of Illinois also distinguished cases in which the trier of fact failed to consider uncontradicted evidence pertaining to a mitigating circumstance, noting that Mr. Evans had presented *no* evidence that he acted under the influence of an extreme mental or emotional disturbance at the time of the offense:

> Here, however, defendant simply failed to establish the *existence* of the mitigating factor by *any* evidence - uncontradicted or otherwise. He presented no testimony whatever that he operated under an *extreme* mental or emotional disturbance *at the time of the offense*, as required by the statute.

Evans, 125 Ill. 2d at 89, 530 N.E.2d at 1377 (emphasis added).

Finally, State misrepresents the failure of the circuit court to make a finding on the prejudice prong of the *Strickland* test on Mr. Evans' claim of ineffective assistance based on defense counsels' failure to investigate and introduce available evidence of extreme mental or emotional disturbance. (State Brief at 18-19) The circuit court concluded that "Evans has failed to satisfy to establish [*sic*] that trial counsel was deficient concerning the presentation of extreme mental or emotional disturbance evidence. Therefore, this claim must fail." (App. 26) The circuit court did *not* address the prejudice prong of the *Strickland* test to determine whether it would have sentenced Mr. Evans to death even if evidence of extreme emotional or mental disturbance had been presented. This fact, along with the other evidence in the record, demonstrates the reasonable probability that, but for the failure to present such evidence, Mr. Evans would not have been sentenced to death.[1]

---

[1] The State contends that the aggravating evidence against Mr. Evans' was so great that there is no reasonable likelihood that he would not have received the death sentence. Foremost among the aggravating evidence that the State relies on is Mr. Evans' admission of guilt in the crime. The State's argument cannot be squared with its argument as to performance prong of

III. MR. EVANS WAS DENIED EFFECTIVE ASSISTANCE BY DEFENSE COUNSELS' FAILURE TO INVESTIGATE AND INTRODUCE OTHER AVAILABLE MITIGATING EVIDENCE

The State also has failed to refute Mr. Evans' claim that he was denied effective assistance based on defense counsels' failure to investigate and introduce available other available mitigating evidence.

First, the State asserts that defense counsel would have been unable to present the testimony that is set forth in Ms. Messner-Peters' affidavit because Ms. Messner-Peters was not licensed as a social worker until 1989, and because such mitigation experts were not common at the time of Mr. Evans' sentencing. (State Brief at 20) This argument misses the mark. Those facts would not have prevented defense counsel from investigating and introducing the vast amount of evidence -- school, medical, and employment records, and other such information -- that underlies Ms. Messner-Peters' analysis. Nor would they have prevented another licensed social worker or qualified expert from preparing the social history.

Next, the State attempts to cloak defense counsels' failure to investigate and introduce other available mitigating evidence under the disguise of trial strategy. "Strategy" does not absolve a defense counsel's error that stems from a failure to investigate and prepare the defendant's case. Specifically, a defense counsel's strategic determination not to introduce potentially damaging mitigation evidence can

---

the *Strickland* test, under which Mr. Evans' denial of guilt allegedly absolved defense counsels' failure to present a mitigation defense based on evidence of extreme emotional or mental disturbance.

only occur after counsel has, in fact, investigated and weighed the value of the evidence. As the Seventh Circuit Court of Appeals has stated in this context:

> Such a determination can rationally be made, however, only after some inquiry or investigation by defense counsel. This does not mean that only a scorch-the-earth strategy will suffice . . . but it does mean that the attorney must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate it will be ineffective assistance.

Hall v. Washington, 106 F.3d 742, 749-750 (7th Cir. 1997). The record in this case does not reflect any effort on defense counsels' part to investigate the plethora of additional mitigating evidence that is contained in Mr. Evans' post-conviction petition, even though the evidence was available at the time of sentencing. Accordingly, defense counsel cannot have considered the merits of such evidence, determined that the evidence was potentially damaging or cumulative, and then strategically determined not to introduce it. This error falls below an objective standard of reasonableness, and the State's "strategy" argument must fail.

For example, defense counsel waited until *after* Mr. Evans was convicted to investigate any potentially mitigating evidence, including evidence that Mr. Evans was acting under extreme emotional or mental disturbance at

the time of the offense.[2] Courts have relied on this factor to sustain a finding that defense counsel's performance was deficient. *See Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995) ("[T]he lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty. . . . This inaction was objectively unreasonable.") *cert. denied*, 519 U.S. 1067 (1996); *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991) ("To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available.").

Further, the State asserts that the other available mitigating evidence would have been cumulative. (State Brief at 25) The Messner-Peters and Girdaukas affidavits are replete with evidence that was not introduced at the sentencing hearing. Among other things, the court was not presented with Mr. Evans' school, medical, and employment records, as well as evidence of the impairment of Mr. Evans' brain functioning. While the State contends that many of the records simply reiterate Mr. Evans' testimony about his educational, medical and employment background, the documents both support Mr. Evans, whose credibility was attacked on cross-examination at trial (TR at 2962 (Q: "Would you lie to save your life?")) and contain new, mitigating details, such as Mr. Evans' efforts to find employment and the factors beyond his control which hindered his ability to find a suitable job. (App. at 42) In addition, the social history prepared by Ms. Messner-Peters

---

[2] Mr. Evans was convicted on May 2, 1984. (TR at 2457) At that time, defense counsel requested a continuance to retain Dr. Rosenwald to examine Mr. Evans. (TR at 2464) Dr. Rosenwald interviewed Mr. Evans on May 18, 1984. (TR at 2970)

was based on extensive documentation and on interviews with Mr. Evans' family members. At trial, the State criticized Dr. Rosenwald for failing to obtain and consider precisely this type of information. (TR at 3024-3025) Most significantly, for the first time, both Ms. Messner-Peters and Dr. Girdaukas have explained the effects of Mr. Evans' background on his social, emotional and psychological development. Thus, this evidence provides a more comprehensive and detailed picture of Mr. Evans' background than what was presented at sentencing, and therefore is not cumulative.

Finally, the State asserts that, even if defense counsel was deficient in failing to introduce the mitigating evidence set forth in the Messner-Peters and Girdaukas affidavits, there is no reasonable probability that Mr. Evans would not have been sentenced to death. The State rehashes the aggravating evidence that was presented against Mr. Evans and assumes that the additional mitigating evidence would not have persuaded the court to sentence Mr. Evans differently. (State Brief at 26-27) This argument ignores the paramount importance of mitigating evidence in capital cases under the Illinois death penalty statute. *See People v. Perez*, 148 Ill. 2d 168, 194, 592 N.E.2d 984, 996 (1989) ("Mitigating evidence is extremely important under the Illinois capital sentencing scheme. Once an aggravating factor is found sufficient to impose the death penalty, there must be mitigating evidence sufficient to preclude the imposition of the death penalty."); *People v. Ruiz*, 177 Ill. 2d 368, 388, 686 N.E.2d 574, 583 (1997) ("This court has acknowledged the critical importance to the sentencing decision of evidence of a capital defendant's background and any mental or emotional problems that afflict him."); *People v. Coleman*, 168 Ill. 2d 509, 537, 660 N.E.2d 919, 934 (1995) (same). Here, there can be no gainsaying the potential effect that the additional mitigating evidence might have had

on the court's decision to impose the death sentence. Indeed, in dismissing this count, the circuit court does not appear to have considered the substance of Ms. Messner-Peters or Dr. Girdaukas' proffered testimony before rejecting this claim. (App. at 26-27) Accordingly, there exists a reasonable probability that, had counsel introduced the evidence, the court would have sentenced Mr. Evans differently.

CONCLUSION

For all of the foregoing reasons, this Court should grant Mr. Evans' petition for a writ of certiorari.

Respectfully submitted,
JULIE A. BAUER
BRUCE R. BRAUN*
CORNELIUS M. MURPHY
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel for petitioner
**Counsel of Record*